

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DEMAREAK J. TURNER,

Plaintiff,

v.

SALINAS VALLEY STATE PRISON, et
al.,

Defendants.

Case No. [18-cv-02289-JD](#)

**ORDER OF DISMISSAL WITH
LEAVE TO AMEND**

Plaintiff, a state prisoner, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. The original complaint was dismissed with leave to amend and plaintiff has filed an amended complaint.

DISCUSSION

STANDARD OF REVIEW

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Although a complaint “does not need detailed factual allegations, . . . a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a

1 cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above
2 the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations
3 omitted). A complaint must proffer “enough facts to state a claim to relief that is plausible on its
4 face.” *Id.* at 570. The United States Supreme Court has explained the “plausible on its face”
5 standard of *Twombly*: “While legal conclusions can provide the framework of a complaint, they
6 must be supported by factual allegations. When there are well-pleaded factual allegations, a court
7 should assume their veracity and then determine whether they plausibly give rise to an entitlement
8 to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

9 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that: (1) a right secured by
10 the Constitution or laws of the United States was violated, and (2) the alleged deprivation was
11 committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

12 **LEGAL CLAIMS**

13 Plaintiff states that he was denied family visiting privileges due to an improperly issued
14 Rules Violation Report (“RVR”) and defendants retaliated against him. California inmates are
15 generally classified for placement and custody designation, and reclassified, if needed, for
16 administrative or disciplinary reasons. Interests protected by the Due Process Clause may arise
17 from two sources-the Due Process Clause itself and laws of the states. *See Meachum v. Fano*, 427
18 U.S. 215, 223-27 (1976). Changes in conditions so severe as to affect the sentence imposed in an
19 unexpected manner implicate the Due Process Clause itself, whether or not they are authorized by
20 state law. *See Sandin v. Conner*, 515 U.S. 472, 484 (1995). Deprivations authorized by state law
21 that are less severe or more closely related to the expected terms of confinement may also amount
22 to deprivations of a procedurally protected liberty interest, provided that (1) state statutes or
23 regulations narrowly restrict the power of prison officials to impose the deprivation, i.e. give the
24 inmate a kind of right to avoid it, and (2) the liberty in question is one of “real substance.” *See id.*
25 at 477-87. Generally, “real substance” will be limited to freedom from (1) a restraint that imposes
26 “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,”
27 *id.* at 484, or (2) state action that “will inevitably affect the duration of [a] sentence,” *id.* at 487.

28 “Within the prison context, a viable claim of First Amendment retaliation entails five basic

elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted). *Accord Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995) (prisoner suing prison officials under § 1983 for retaliation must allege that he was retaliated against for exercising his constitutional rights and that the retaliatory action did not advance legitimate penological goals, such as preserving institutional order and discipline). The prisoner must show that the type of activity he was engaged in was constitutionally protected, that the protected conduct was a substantial or motivating factor for the alleged retaliatory action, and that the retaliatory action advanced no legitimate penological interest. *Hines v. Gomez*, 108 F.3d 265, 267-68 (9th Cir. 1997) (inferring retaliatory motive from circumstantial evidence).

Plaintiff argues that he was improperly found guilty at a RVR hearing resulting in the loss of family visiting privileges. Plaintiff describes no other aspects of the punishment. Plaintiff has failed to demonstrate that the loss of family visiting privileges was an atypical and significant hardship related to ordinary prison life to state a constitutional violation. The amended complaint is dismissed with leave to amend to address the legal standards set forth above. Plaintiff also states that the RVR finding was due to retaliation, but he provides no allegations in support nor does he identify how defendants were involved. Plaintiff should address these deficiencies in a second amended complaint. Plaintiff's allegations that defendants violated prison regulations and rules fail to state a constitutional violation and that claim is dismissed with prejudice.

CONCLUSION


1. The amended complaint is **DISMISSED** with leave to amend. The second amended complaint must be filed within **twenty-eight (28) days** of the date this order is filed and must include the caption and civil case number used in this order and the words **SECOND AMENDED COMPLAINT** on the first page. Because an amended complaint completely replaces the original complaint, plaintiff must include in it all the claims he wishes to present. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). He may not incorporate material from the

1 original complaint by reference. Failure to amend within the designated time will result in the
2 dismissal of this case.

3 2. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the
4 Court informed of any change of address by filing a separate paper with the clerk headed "Notice
5 of Change of Address," and must comply with the Court's orders in a timely fashion. Failure to
6 do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of
7 Civil Procedure 41(b).

8 **IT IS SO ORDERED.**

9 Dated: November 19, 2018

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14 JAMES DONATO
15 United States District Judge
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on November 19, 2018, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Demareak J. Turner ID: K53249
Salinas Valley State Prison
P.O. Box 1050
Soledad, CA 93960

Dated: November 19, 2018

Susan Y. Soong
Clerk, United States District Court

By: 
LISA R. CLARK, Deputy Clerk to the
Honorable JAMES DONATO